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No. 86-69

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

WILLIAM CONWAY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

BRIEF OF AMICUS CURIAE PRIVATE TRUCK COUNCIL OF AMERICA, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Private Truck Council of America, Inc., urges the Court to grant the petition for a writ of certiorari to the Supreme Court of Vermont to review the exceedingly important and recurring question of constitutional remedies presented by that court's judgment.

THE INTEREST OF AMICUS CURIAE

The Private Truck Council of America, Inc. is a business association of companies engaged in private motor carriage— *i.e.*, carriage not for hire but in furtherance of their own nontransportation businesses. PTCA has more than 1800 members and associated companies. On

behalf of its members PTCA has taken an active role in challenging state motor carrier taxes and fees that discriminate against interstate commerce or otherwise violate the United States Constitution or federal laws. In 1984 PTCA succeeded in obtaining a judgment by the Supreme Court of Indiana striking down an Indiana property tax levied solely on vehicles engaged in interstate commerce. *Huie v. Private Truck Council of America, Inc.*, 466 N.E.2d 485 (Ind. 1984). In 1986 PTCA successfully challenged a Louisiana fee imposed only on private carriers operating in interstate commerce in Louisiana and registered in other states. *Private Truck Council of America, Inc. v. Louisiana*, No. 289, 481 (19th Judicial Dist. Ct. East Baton Rouge Parish; judgment entered Jan. 20, 1986.) In 1986 PTCA also obtained favorable judgments from the Supreme Courts of Maine and New Hampshire invalidating so-called "retaliatory taxes" imposed by those states only on carriers whose vehicles are registered in certain other states. *Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214 (1986), *cert. denied* No. 85-1423 (1986); *Private Truck Council of America Inc. v. State of New Hampshire*, (N.H. S. Ct. No. 86-088; decided August 12, 1986). PTCA is currently prosecuting suits against five other states that impose similar retaliatory taxes, and it intends to continue to monitor state taxes and fees closely and, if possible, to challenge those it believes to be unconstitutional.

In view of its activities, PTCA and its members have a vital interest in the question presented by the petition in this case—whether a state may constitutionally refuse to refund taxes that have been unconstitutionally exacted as a condition of the right to operate in the state. State motor carrier taxes and fees impose an enormous burden on all segments of the interstate motor carrier industry, including particularly private carriers, and discriminatory or otherwise unconstitutional taxes and fees comprise a

significant portion of that burden. To permit states to retain such unconstitutional exactions deprives PTCA and its members of the very protections the Commerce Clause was adopted to provide.

ARGUMENT

PTCA fully agrees with petitioners that the decision of the Vermont Supreme Court refusing to grant refunds of unconstitutionally exacted fees presents an exceedingly important and recurring question. As the petition documents (Pet. 8-11), numerous recently decided and pending cases present this issue, and these cases involve hundreds of millions of dollars of assertedly unconstitutional taxes imposed by states each year on interstate motor carriers.

PTCA also agrees with petitioners that the decision below conflicts squarely with decisions of this Court. As this Court held in *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930), a "denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." See also *Ward v. Love County*, 253 U.S. 17, 24 (1920); *United States v. State Tax Commission of Mississippi*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981).[1]

A denial of such recovery is also plainly at odds with the Commerce Clause, and it largely nullifies the protections that Clause gives to persons engaged in inter-

[1] The court below relied on the Eleventh Amendment in support of its conclusion that the State is immune from any obligation to return unconstitutional taxes, but that reliance is plainly erroneous. As this Court recently explained in *Atascadero State Hospital v. Scanlon*, —— U.S. ——, 105 S.Ct. 3142, 3147 (1985), the Eleventh Amendment is only a restriction on the jurisdiction of federal courts, and does not relieve state courts from their obligation to "enforce the supreme law of the land" against states.

state commerce. The principle that states may not, under the Commerce Clause, impose taxes that discriminate in favor of local business and against interstate commerce has been described by this Court as "one of the fundamental principles of Commerce Clause jurisprudence." *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). The clear message to states of the decision below, however, is that they *may* burden interstate commerce with discriminatory taxes; they may do so for as long as they can drag out any suit challenging such taxes.

This case is a perfect illustration of how that result can effectively nullify the protections of the Commerce Clause. The challenged fees in this case were first enacted in 1981 and were promptly challenged by petitioners, who unsuccessfully sought a preliminary injunction against their future collection. In 1982 the Vermont Supreme Court reversed an initial decision upholding the fees and remanded with directions to the trial court to conduct an extensive factual inquiry into the cost-per-mile impact of Vermont's fee system on different carriers. Pet. App. 24a-30a. After that process and further appeals consumed another four years, the same court held the same fees unconstitutional on their face and without regard to their impact on a per-mile basis. Pet. App. 15a-21a. At the same time, however, the court has permitted the State to retain some $25 million of fees collected over the five years of litigation. Moreover, although the decision prospectively prevents Vermont from collecting any more of these fees, there is nothing to stop the State from enacting some new discriminatory tax or fee in some slightly different form and collecting that new levy for as long as it may take taxpayers to obtain a final adjudication of its unconstitutionality.

Furthermore, if states believe they will not be, or even may not be, liable to return unconstitutional taxes, they have no incentive to seek or facilitate the speedy resolu-

tion of suits challenging them. Quite the contrary. Similarly state courts, where such actions must usually be brought for reasons of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, have little incentive to accord much urgency to suits attacking state revenue measures, particularly those brought by out-of-state businesses challenging taxes that favor their locally-based competitors.[2]

The decision below is not an isolated aberration; it is one of a number of recent state supreme court decisions denying recovery of unconstitutional taxes to out-of-state claimants. Most recently, after the petition in this case was filed, the Supreme Court of New Hampshire, in a case brought by the PTCA and others, upheld the taxpayers' claim that retaliatory motor carrier taxes imposed by that State since 1982 were unconstitutional but it denied their claims for refunds of taxes paid before the suit was filed in December 1984. *Private Truck Council of America, Inc. v. State of New Hampshire, supra.*[3] Because the New Hampshire legislature repealed the tax shortly after the suit was filed, the result of the decision was that the State will retain most of the $3 million in taxes collected under the unconstitutional statute.

Similarly, the Supreme Courts of New Jersey and Maine recently refused to require the return of taxes on motor carriers found to be unconstitutional. *Continental Trailways, Inc. v. Director, Division of Motor Vehicles,* 509 A.2d 769 (N.J. 1986); *Private Truck Council of America, Inc. v. Secretary of State, supra.* In New Jersey the court candidly admitted that the denial of re-

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[2] To say this is not to question the integrity or conscientiousness of state attorneys general and state courts but simply to recognize that they are subject to natural tendencies that the Commerce Clause itself was adopted in recognition of and as protection against.

[3] A copy of this decision has been filed with the Court by petitioner in a supplemental memorandum filed September 11, 1986 in support of this petition.

funds was based on the court's policy to place the state's revenue interests over the federal constitutional rights of interstate carriers. The court stated (509 A.2d at 780): "Public policy discourages suits for refunds of taxes erroneously paid or illegally collected." See also *Private Truck Council of America, Inc. v. State of New Hampshire, supra*, slip op. at 7-8, denying refunds on the basis of "policy considerations" relating to the state's revenue interests.

In sum, it is apparent that an alarming number of state courts are subordinating the policies of the Commerce Clause to the revenue interests of their states. This Court should grant the petition and reverse the judgment of the Vermont Supreme Court in order to make clear to all states that the policies and protections of the federal Constitution remain the paramount law of the land.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the Vermont Supreme Court denying refunds of unconstitutional taxes.

Respectfully submitted,

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